1998

State of Utah v. Kandice Jean Hatch : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	
Plaintiff and Appellee,	)	
	)	Appellate Case No. 981585-CA
v.	)	
	)	Priority No. 2
KANDICE JEAN HATCH,	)	
	)	
Defendant and Appellant.	)	

BRIEF OF THE APPELLANT

Appeal from the Judgment and Order of Commitment
Eighth District Court
Uintah County, State of Utah
Honorable A. Lynn Payne, Judge

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Oral argument requested

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II. It is improper for one witness to be used to offer an opinion about the veracity of another witness. Evidence regarding a witness' reputation for untruthfulness in the community always requires proper foundation, including reputation at the time of trial and reputation in the community at large as opposed to reputation among police personnel. The admission of such evidence in this case was clearly erroneous. Further, it affected Hatch's substantial rights.

III. A prosecutor may not call to the attention of the jury any matter it would not be justified in considering in determining its verdict. A prosecutor may not express his personal opinion as to the truth or falsity of testimony, the guilt of the accused, or the justness of the prosecution. The prosecutor did so in this case. Absent such misconduct, there was a reasonable likelihood of a more favorable result for Hatch.

IV. The errors committed during trial were substantial. Even if they were harmless individually, they were harmful cumulatively. It cannot be said, with any degree of confidence, that Hatch received a fair trial.

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BRIEF OF THE APPELLANT

Appeal from the Judgment and Order of Commitment
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STATEMENT OF JURISDICTION

Kandice Jean Hatch, Defendant and Appellant, through counsel, appeals her jury convictions on three counts: count (I), burglary of a non-dwelling, a third degree felony, in violation of Utah Code Ann. § 76-6-202 (1973); count (II), theft by deception, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-405 (1973); and count (III),

theft, a class A misdemeanor, in violation of Utah Code Ann. § 76-6-404 (1973). The court of appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(e).

STATEMENT OF ISSUES PRESENTED FOR REVIEW, WITH STANDARDS OF REVIEW

Issue 1

Did the trial court err in allowing the prosecutor to introduce Rule 609(a) impeachment evidence against Hatch when the evidence consisted of Hatch's guilty pleas to two counts of felony forgery in a separate court action but she had not yet been sentenced in that matter? Standard of review: Whether evidence is admissible is a question of law which the court of appeals reviews for correctness incorporating a clearly erroneous standard of review. Furthermore, in reviewing a trial court's decision to admit evidence, the court of appeals will not reverse that ruling unless a substantial right of the party has been affected. *State v. Diaz*, 859 P.2d 19, 23 (Utah App.1993).

Issue 2

Did the trial court err in allowing the prosecutor to introduce Rule 608(a) character evidence against Hatch when the evidence consisted of a police officer's testimony about his impression of Hatch's veracity when he interviewed her as well as

her reputation in the community for untruthfulness? Standard of review: Whether evidence is admissible is a question of law which the court of appeals reviews for correctness incorporating a clearly erroneous standard of review. Furthermore, in reviewing a trial court's decision to admit evidence, the court of appeals will not reverse that ruling unless a substantial right of the party has been affected. *Diaz*, *supra*, at 23.

Issue 3

Did reversible prosecutorial misconduct occur when the prosecutor introduced Rule 609 and Rule 608 evidence against Hatch and also asserted personal knowledge and belief about disputed facts and the guilt of the accused? Standard of review: The court of appeals will reverse on the basis of prosecutorial misconduct only if defendant has shown that the actions or remarks of prosecuting counsel call to the attention of the jury a matter it would not be justified in considering in determining its verdict, and, if so, under the circumstances of the particular case, whether the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result. *State v. Cummins*, 839 P.2d 848, 852 (Utah App.1992), *cert. denied*, 853 P.2d 897 (Utah 1993).

Issue 4

Was there reversible cumulative error? Standard of review: The court of appeals will reverse a conviction if the cumulative effect of several errors undermines the court's confidence that defendant was given a fair trial. *State v. Bryant*, 965 P.2d 539, 550 (Utah App.1998).

Issue 5

Was there sufficient evidence to convict Hatch on each of the three counts with which she was charged? Standard of review: The court of appeals reviews the evidence and all reasonable inferences drawn from that evidence in the light most favorable to the jury's verdict and will reverse only if that evidence is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which she was convicted. *State v. Longshaw*, 961 P.2d 925, 931 (Utah App.1998).

DETERMINATIVE CONSTITUTIONAL PROVISONS, STATUTES, ORDINANCES AND RULES

Rule 608(a), Utah Rules of Evidence
Rule 609(a), Utah Rules of Evidence

STATEMENT OF THE CASE

A. Nature of the Case

Hatch initially was charged with three counts: count (I), burglary of a non-dwelling, a third degree felony; count (II), theft by deception, a class A misdemeanor; and count (III), theft, a class A misdemeanor. Count (II) subsequently was amended to theft by deception, a class B misdemeanor.

B. Course of Proceedings

Preliminary hearing was held on December 10, 1997. Hatch was bound over on, and denied, all three counts. A one-day jury trial was held on March 11, 1998. The jury found Hatch guilty on all counts.

C. Disposition at Trial Court

The trial count sentenced Hatch on August 4, 1998 as follows: count (I), burglary of a non-dwelling, a third degree felony, zero to five years in state prison and a $1,000 fine; count (II), theft by deception, a class B misdemeanor, six months in jail and a $250 fine; and count (III), theft, a class A misdemeanor, one year in jail and a $500 fine. Prison and jail terms were to be served concurrently. The court also ordered Hatch to pay restitution in the amount of $4,200 to Grace Sharp and $705 to Bill Wilson.

RELEVANT FACTS

Because Hatch is appealing from a jury verdict, she recites the facts in a light most favorable to the jury's verdict but presents conflicting evidence to the extent necessary to clarify issues raised on appeal. *State v. Vigil*, 922 P.2d 15, 18 (Utah App.1996).

In August 1996 Bill Wilson rented a storage unit at Seeley's Storage in Vernal, Utah. He placed numerous items of personal property in the unit. Many belonged to his ex-wife, Grace Sharp. On February 28, 1997, when Wilson was at the unit, everything was in order. However, on March 15, 1997, when Wilson returned to pick up a washing machine, he noticed that the latch on the unit had been broken off. The contents of boxes were strewn about. A stereo cabinet was destroyed. Certain items including household furniture were missing. Wilson immediately called the police. Deputy Anthony Byron, Uintah County Sheriff's Office, responded. When asked, Wilson told Byron that he suspected Hatch and her daughters of breaking into the unit and stealing items. Tr. 114-16, 126, 155-57.

On March 19, 1999 Hatch went to Jiffy Pawn in Vernal. She had with her a saddle. The saddle had been given to Sharp as a child by her father. Hatch sold the saddle to the pawn shop for fifty dollars. She executed a bill of sale, providing

her name, date of birth and driver's license ID number. Tr. 145-47, 233-34.

The above facts were undisputed at trial. Disputed, however, was whether the saddle had been in Wilson's storage unit at the time of the burglary, as well as whether Wilson had given the saddle to Hatch and therefore Hatch was in rightful possession when she sold it. Hatch testified that in mid-March 1997 Wilson came to her residence and gave her the saddle, as compensation for items of personal property that he had taken from a separate storage unit containing her belongings. Tr. 231-33, 257-58. Hatch's version of events was supported by the testimony of a daughter, Mandy, who stated that she was present when the discussion between Wilson and Hatch occurred. Tr. 211-15. Another defense witness, Joseph King, testified that he saw the saddle at Hatch's residence and that Hatch told him that Wilson had given it to her. Tr. 220-21. On the other hand, Wilson testified that the saddle was in his storage unit in March 1997 and that he never had given it to Hatch or told her she could keep it. Tr. 158, 161-63, 175-76, 267-68. Sharp testified that she gave the saddle to Wilson to put in storage in January 1997 and that she never authorized him to dispose of it in any manner. Tr. 182-83.

There were no witnesses to the burglary and theft. Fingerprints were not taken at

the crime scene. Tr. 126-27. No stolen property, except for the allegedly stolen saddle, was ever found in Hatch's possession or linked to her. Therefore the case boiled down to the word of Wilson against the word of Hatch. Credibility was all important. In the end, the jury believed Wilson and inferred from his testimony, along with the undisputed fact that Hatch had sold the saddle to Jiffy Pawn, that Hatch must have burglarized the storage unit, taken all of the missing property and received fifty dollars for the saddle by deception.

During trial, the prosecutor repeatedly attacked Hatch's credibility using improper means. The prosecutor impeached Hatch by referring to her guilty pleas to two counts of felony forgery in a separate court action, even though she had not yet been sentenced in that matter. *See* Tr. 109, 238-48, 253, 279-80, 291. He also had a police officer testify about his impression of Hatch's veracity as well as her reputation in the community for untruthfulness, despite lack of proper foundation. *See* Tr. 108-09, 196-99, 248-52, 260, 261-63, 280. Finally, the prosecutor asserted personal knowledge and belief about disputed facts and the guilt of the accused. *See* Tr. 108-09. These attacks, Hatch believes, swayed the jury in its determination of whom to believe and led directly to the adverse outcome that she had at trial.

SUMMARY OF THE ARGUMENT

The trial court erred in allowing the prosecutor repeatedly to make improper use of Rule 609(a) impeachment evidence against Hatch. Shortly before trial, in a separate matter, Hatch had pleaded guilty to two counts of felony forgery. However, she was not sentenced until August 1998, some five months after trial. Error occurred when the court allowed admission of what were only pending convictions. Hatch's substantial rights were affected. The trial court also erred in allowing the prosecutor repeatedly to make improper use of Rule 608(a) character evidence against Hatch. A state's witness, a police officer, offered his opinion about Hatch's veracity during an investigatory interview. The same police officer testified about Hatch's reputation in the community for untruthfulness, despite lack of proper foundation. Error occurred here. Hatch's substantial rights again were affected. The prosecutor's introduction of Rule 609 and Rule 608 evidence rose to the level of prosecutorial misconduct. Such misconduct also occurred when the prosecutor asserted personal knowledge and belief about disputed facts and the guilt of the accused. Error, even if harmless individually, was harmful cumulatively. Finally, there was not sufficient evidence to convict Hatch on any of the three counts with which she was charged.

ARGUMENT

I. IMPEACHMENT EVIDENCE

It is well established in this jurisdiction that a defendant's guilty plea to a crime involving dishonesty or false statement, pending sentencing, is not admissible for purposes of impeachment under Rule 609(a). The admission of such evidence in this case was clearly erroneous. Further, it affected Hatch's substantial rights.

Throughout trial, the trial court erred in allowing the prosecutor repeatedly to make improper use of Rule 609(a)(2)[1] impeachment evidence against Hatch.

Remarkably, the prosecutor first attacked Hatch's credibility in opening statement. He indicated to the jury, before the fact, that Hatch would testify in her own defense. He then said, "We'll see what she has to say. I'll ask you to listen carefully to her.... And I'll ask you to listen carefully as I present to her the records of her past, her most recent past, her convictions wherein she admitted, finally, to the court that she was lying about other things." Tr. 109, ll. 4-9.

Hatch did testify at trial. Immediately afterwards, the trial court took a recess and called the prosecutor and defense counsel into chambers. It stated, "We are in chambers,

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[1]Rule 609(a)(2) reads, "(a) *General rule*. For the purpose of attacking the credibility of a witness, ... (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment."

and at the court's request, I am going to go over whatever the parties want to get into as to the record, criminal record of the defendant. And I do that because if it's not admissible, I don't want to prejudice the jury." Tr. 236, ll. 8-13. One of the matters discussed was Hatch's recent admission to two counts of felony forgery, in a separate court action. *See generally* Tr. 238-48. Over the prosecutor's objections the trial court ruled that Hatch's admission could not come in under Rule 404(b). At 239. However, at the prosecutor's insistence and absent objection from defense counsel, the court ruled that it could come in under Rule 609.[2] At 243-44.

The prosecutor subsequently cross-examined Hatch. The following exchange took place:

> Q: ...Have you ever been convicted of a crime involving facilitating a fraud or making, completing, executing, authenticating, issuing, transferring, publishing, or uttering any writing so that the making, completion, execution, authentication, issuance, transference, publication or utterance

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[2]On February 25, 1998, fifteen days before trial in this case, Hatch had pleaded guilty to two counts of felony forgery in a separate court matter. However, her sentencing hearing was not held until August 11, 1998, five months to the day after trial. Her judgment and order of commitment on the forgery counts was not entered by the court until August 31, 1998. *See* Attachment A, Judgment and Order of Commitment; *see also* Tr. Exhibit No. 3.

purported to be the act of another, specifically, to wit, a number of bank checks issued on another person's account?

A: Yes. I plead guilty on two counts, forgery.

Q: And those are felony forgeries, and that was within the last few days? Few weeks?

A: About a week ago, I think.

Tr. 253, ll. 2-14. The prosecutor then moved for admission of Exhibit No. 3, the plea agreement that Hatch signed when she admitted the forgeries. With no objection from defense counsel, the court received the exhibit as evidence. Tr. 253, ll. 15-25.

In closing argument, the prosecutor attacked Hatch's testimony regarding the events in question by referring to his impeachment of her. He stated, "Truth? Or not? And as unpleasant as it may be, I am required to remind you that the defendant stands before you a convicted felon. Not convicted of something that's irrelevant, but something that tells you what kind of person she is." Tr. 279, l. 23 to 280, l. 3. The prosecutor also referred to Exhibit No. 3, the plea agreement. He said, "[Y]ou have a document of this court, a conviction of this court, Eighth District Court, in which on two occasions, at least, the defendant stands convicted before you of a crime of dishonesty."

Tr. 280, ll. 14-18.

Finally, in rebuttal, the prosecutor commented on Hatch's credibility, indirectly referring to the forgeries. He said, "Now, it's true, there are [sic] some conflicting evidence here. Now, we have talked about the defendant's inability to tell the truth and be honest." Tr. 291, ll. 17-19.

Errors arguably were made by the trial court, the prosecutor and defense counsel alike in the use of Rule 609(a)(2) evidence. The common error is that a defendant's admission of a crime involving dishonesty or false statement, pending sentencing, does not constitute a prior conviction under Rule 609. The matter was first considered in *State v. Morrell*, 803 P.2d 292 (Utah App.1990). The court of appeals observed, "In view of the liberality with which motions to withdraw guilty pleas are to be granted prior to sentence ... we see real difficulty, for Rule 609(a)(2) purposes, in equating a mere guilty plea, prior to sentencing, with an actual conviction." At 299 n. 2. Later, in *State v. Duncan*, 812 P.2d 60, 64 (Utah App.1991), *cert. denied*, 826 P.2d 651 (Utah 1991), the court of appeals held, "[I]t is the final judgment of the court on a guilty verdict or plea that constitutes a conviction for impeachment purposes under Rule 609(a)(1)." The holding in *Duncan* is not limited to subsection (a)(1). The court of appeals clarified, in

State v. Diaz, 859 P.2d 19, 23 (Utah App.1993), that a defendant's pending sentencing is not admissible as impeachment evidence under Rule 609(a) generally.

"Whether evidence is admissible is a question of law, which we review for correctness, incorporating a 'clearly erroneous' standard of review...." *Diaz*, *supra*, at 23 (citing *State v. Reed*, 820 P.2d 479, 481 (Utah App.1991); *State v. Ramirez*, 817 P.2d 774, 781 n. 3 (Utah 1991); *accord State v. Gray*, 851 P.2d 1217, 1224 (Utah App.1993), *cert. denied*, 860 P.2d 943 (Utah 1993)). "Furthermore, 'in reviewing a trial court's decision to admit evidence, we will not reverse that ruling unless a substantial right of the party has been affected.'" *Id.* (quoting *State v. Oliver*, 820 P.2d 474, 479 (Utah App.1991), *cert. denied*, 843 P.2d 516 (Utah 1992)).

Applying this standard to the instant case, it was clearly erroneous for the prosecutor to refer to--not to mention misrepresent--Hatch's pending forgery convictions in opening statement. It was clearly erroneous for the prosecutor to cross-examine Hatch about her plea and comment on this matter in closing argument and rebuttal. It likewise was clearly erroneous for the jury to be made aware of Exhibit No. 3, Hatch's plea agreement. In view of *Duncan* and *Diaz* it is well established in this jurisdiction that a defendant's guilty plea to a crime involving dishonesty or false statement, pending

sentencing, is not admissible for purposes of impeachment under Rule 609(a).

Hatch's substantial rights, including her right to due process and fundamental fairness at trial, were severely affected by the error that occurred.

The prosecutor's remarks about Hatch's "convictions," in opening statement, were particularly egregious and deserve comment. An opening statement can be the most critical stage in a jury trial. The jury forms its first and often lasting impression of a case. More particularly, as Professor Gershman notes, "Character proof is one of the most devastating forms of evidence. The prejudicial impact of the defendant's criminal or sordid past on the jury can be overwhelming. (Citing 1 John Henry Wigmore, *Evidence* § 57 (1940) ("The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of court.")). Empirical studies suggest that when the jury learns about the defendant's criminal history, the chances of acquittal are greatly diminished. (Citing Harry Kalven & Hans Zeisel, *The American Jury*, at 160 (1966) (showing that when a defendant's criminal record is known and the prosecution's case has weaknesses, the defendant's chances of acquittal are 38 percent, compared to 65 percent otherwise))." Bennett L. Gersham,

Trial Error and Misconduct, at 161-62 (1997).

In addition, as the supreme court has declared in *State v. Williams*, 656 P.2d 450, 452 (Utah 1982), "The purpose of an opening statement is to apprise the jury of what counsel intends to prove in *his own case in chief* by way of providing the jury an overview of, and general familiarity with, the facts the party intends to prove. (Citation omitted.) It is generally accepted that an opening statement should not be argumentative. *It is not proper to engage in anticipatory rebuttal or to argue credibility by referring to impeachment evidence...* (emphasis added)."

The prosecutor's impeachment of Hatch, not just in opening statement but cross-examination, closing argument and rebuttal, had a clearly negative cumulative effect. The jury heard, again and again, that Hatch was a liar, a dishonest person, whose testimony now even under oath was unworthy of belief and surely false.

Review of the jury instructions shows that they are devoid of any kind of curative instruction about the prosecutor's use of Rule 609(a)(2) evidence. This of course is not surprising as no one recognized error. However, because error occurred and there was no attempt to cure it, Hatch also was prejudiced in this manner.

Most significantly, there was not convincing properly admitted evidence of all

essential elements of the three crimes of which Hatch was convicted. With respect to count (I), burglary of a non-dwelling, no witness saw Hatch break into Bill Wilson's storage locker. No physical evidence, such as fingerprints, linked Hatch to the scene. The prosecutor's case against Hatch was circumstantial. Indeed it was based on the highly speculative theory that Hatch was a woman scorned who took revenge on Wilson by trashing his locker and stealing a saddle belonging to his ex-wife after Wilson and she renewed their relationship. With respect to count (III), theft, Hatch and Wilson both testified and gave conflicting evidence about how Hatch came to be in possession of the saddle. Hatch said that Wilson gave it to her to make amends after he had taken but not returned certain items of personal property belonging to her. Wilson denied giving the saddle to Hatch. One of them was lying. In the end, the jury had to decide who was the more credible witness. The prosecutor's repeated attacks on Hatch's character, by the use of inadmissible evidence, prejudiced the jury and made it impossible for them to judge witness credibility fairly. With respect to count (II), theft by deception, assuming insufficient proof that Hatch illegally possessed the saddle, there was insufficient proof that she deceived Jiffy Enterprises and wrongly obtained money when she sold it.

For all these reasons, but for the erroneous failure to exclude Hatch's admissions

pending sentencing, there was a reasonable likelihood of a more favorable result for Hatch at trial. *See State v. Bruce*, 779 P.2d 646, 656 (Utah 1989) (stating "the standard for reversal in cases involving an erroneous failure to exclude prior convictions is whether absent the error, there was a reasonable likelihood of a more favorable result for the defendant"). Error, in the instant case, clearly was harmful not harmless. It led directly to the adverse outcome that Hatch had at trial. Hatch's convictions on all three counts should be reversed.

II. CHARACTER EVIDENCE

> *It is improper for one witness to be used to offer an opinion about the veracity of another witness. Evidence regarding a witness' reputation for untruthfulness in the community always requires proper foundation, including reputation at the time of trial and reputation in the community at large as opposed to reputation among police personnel. The admission of such evidence in this case was clearly erroneous. Further, it affected Hatch's substantial rights.*

Throughout trial, the trial court also erred in allowing the prosecutor repeatedly to make improper use of Rule 608(a)[3] character evidence against Hatch.

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[3]Rule 608(a) reads, "(a) *Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."

The prosecutor, in opening statement, made reference to Sergeant Hatzidakis, a state's witness. He said, "And then we'll also ask you to listen to Sergeant Hatzidakis as he tells you what happened when he went to confront the defendant and how her story shifted and changed to suit what might be most convenient, and how he didn't think he could believe her simply because she was telling a shifting story." Tr. 108, l. 23 to 109, l. 4. This was error. It is improper for one witness to be used to offer an opinion about the credibility of another witness. In jury trials, it is the jury alone who are the judges of witnesses' truthfulness or untruthfulness. *State v. Stefanik*, 900 P.2d 1094, 1095-96 (Utah App.1995) (citing *State v. Rammel*, 720 P.2d 498, 500 (Utah 1986); *State v. Rimmasch*, 775 P.2d 388, 392 (Utah 1989); *State v. Workman*, 852 P.2d 981, 984 (Utah 1993)). Even more to the point, the supreme court expressly has stated that "Under Utah Rule of Evidence 608(a) and *Rimmasch*, one witness may not testify as to the credibility of statements made by another person on a particular occasion." *State v. Harmon*, 956 P.2d 262, 271 (Utah 1998).

The prosecutor, on direct examination, asked Hatzidakis about his experience and training as an interrogator, then about his impression of Hatch when he interviewed her following the burglary of Wilson's locker. *See generally* Tr. 196-99. *Sua sponte*, the

trial court objected to the prosecutor in effect inviting Hatzidakis to comment on Hatch's credibility during the interview. "Just a minute. It's asking him to evaluate and comment on the truthfulness of the statement." Tr. 198, ll. 12-14. Significantly, however, the court based its action not on Rule 608 or *Rimmasch* but rather the fact that Hatzidakis was "not qualified" to make such comments. *Id.*; *see also* Tr. 199, ll. 4-5. The court never identified the true nature of the error that had occurred. Likewise, it never cured the error by instructing the jury that they should disregard the remarks of Hatzidakis insofar as he referred to Hatch's credibility.

Also, when the prosecutor and defense were in chambers, immediately following Hatch's direct testimony, the prosecutor indicated that he wished to recall Sergeant Hatzidakis as a rebuttal witness to testify about Hatch's reputation for untruthfulness. There was a colloquy about Rule 608(a). *See generally* Tr. 248-52. The court ruled that Rule 608 evidence would be allowed in. At 251-52.

Hatzidakis testified as a rebuttal witness. However, before asking Hatzidakis about Hatch's reputation for untruthfulness, the prosecutor had him, one more time, comment improperly on her credibility. Hatch had testified that to the best of her memory she had had only two interactions with Hatzidakis over a twelve-year period. The prosecutor

now asked Hatzidakis, "Sergeant ... you just heard the defendant testify that she's only dealt with you on two occasions over those twelve years that you have been here in town. Would you please tell the jury whether that's accurate or not?" Tr. 260, ll. 5-9. Hatzidakis answered, "Very inaccurate." Tr. 260, l. 10. In view of Rule 608(a) and *Rimmasch* this also was error. The prosecutor certainly was permitted to ask Hatzidakis how many times Hatch and he had had contact over a specific period of time. He was entitled to point out any discrepancy in the testimony of Hatch and Hatzidakis at an appropriate moment, for instance in closing argument. But he should not have had Hatzidakis say in so many words that Hatch lied or was dishonest in her testimony about their contact.

The prosecutor eventually asked Hatzidakis about Hatch's reputation for truthfulness or untruthfulness, and Hatzidakis, in response, said, "I think [her reputation] would be more towards the untruthfulness or deceptive." *See* Tr. 262, l .25 to 263, l. 13.

The question was put to Hatzidakis improperly. For one thing, whether a witness simply has a reputation for untruthfulness is irrelevant. What is relevant is whether a witness has a reputation for untruthfulness during the time period when he or she gives testimony as a witness. The prosecutor, in the instant case, lay no foundation whatsoever

that Hatch had a reputation for untruthfulness at the time of trial. *See United States v. Null*, 415 F.2d 1178 (4th Cir. 1969) (stating that reputation for truthfulness or untruthfulness must be established at the time of trial). Furthermore, the trial court erroneously lifted the burden that the prosecutor had to lay foundation as to the "community" in which Hatch had her reputation. The court, correctly, noted that Hatzidakis needed to testify about Hatch's reputation in the community, not among law enforcement personnel. Tr. 261, l. 23 to 262, l. 2. The prosecutor and defense counsel argued about this matter. When defense counsel objected that the prosecutor still was not laying proper foundation with reference to the community at large, the court overruled him, saying that that was a matter for cross-examination. Tr. 263, ll. 4-9. The prosecutor never did set forth sufficient foundation showing the specific nature and extent of the community in which Hatch's reputation for untruthfulness supposedly existed.

The prosecutor's failure to lay proper foundation as to Hatch's reputation in the community is reflected in his confusing reputation evidence and opinion evidence in closing argument. The prosecutor had indicated, in chambers, that he wished to use Hatzidakis to inform the jury about Hatch's reputation in the community. In closing

argument, though, the prosecutor stated that what Hatzidakis had testified to was his opinion of Hatch's reputation in the community. "And he's able to tell you what her reputation is. And that was his opinion." Tr. 280, ll. 8-9. Properly speaking, there are two distinct forms of Rule 608 character evidence. Evidence of a person's reputation among members of the community is reputation evidence. Evidence consisting of a witness' personal opinion is opinion evidence. Hatzidakis in fact only gave opinion evidence. The prosecutor misrepresented that in Hatzidakis' rebuttal testimony and improperly led the jury to believe that Hatch's reputation among people in the community was that of an untruthful or deceptive person.

"Whether evidence is admissible is a question of law, which we review for correctness, incorporating a 'clearly erroneous' standard of review...." *Diaz*, *supra*, at 23 (citations omitted). "Furthermore, 'in reviewing a trial court's decision whether to admit evidence, we will not reverse that ruling unless a substantial right of the party has been affected." *Id.* (citation omitted).

For the reasons stated, it was clearly erroneous for evidence to come in indirectly from the prosecutor and directly from Sergeant Hatzidakis about Hatch's credibility during police interview. It was clearly erroneous for Hatzidakis to indicate that Hatch

lied when she testified that the two of them had had only limited contact with each other over a twelve-year period. It also was clearly erroneous for Hatzidakis to present evidence about Hatch's reputation in the community for untruthfulness. Hatch's substantial rights at trial were affected. The only piece of evidence linking Hatch to the three crimes with which she was charged was the saddle, which she always freely admitted that she pawned. How she came to be in possession of the saddle was the main factual issue in the instant case. Hatch testified that Wilson gave it to her. Wilson testified that he did not. The case, then, boiled down to one person's word against another. The jury needed to make a decision about whom to believe. However, the jury's decision-making was clouded even poisoned by the improper introduction of Rule 608(a) reputation evidence. The jury heard, repeatedly, that Hatzidakis believed Hatch was lying to him and that she had a reputation in the community for untruthfulness. The jury should have heard none of this evidence. But for its erroneous admission, there was a reasonable likelihood of a more favorable result for Hatch at trial. *State v. Bruce*, *supra*, at 656. Hatch's convictions on all three counts should be reversed on this separate ground.

III. PROSECUTORIAL MISCONDUCT

> *A prosecutor may not call to the attention of the jury any matter it would not be justified in considering in determining its verdict. A prosecutor may not express his personal opinion as to the truth or falsity of testimony, the guilt of the defendant, or the justness of the prosecution. The prosecutor did so in this case. Absent such misconduct, there was a reasonable likelihood of a more favorable result for Hatch.*

The prosecutor's introduction of Rule 609 and Rule 608 evidence against Hatch rose to the level of misconduct. Such misconduct also occurred when the prosecutor, in opening statement, asserted personal knowledge and belief about disputed facts and the guilt of the accused.

"[The court of appeals] will reverse on the basis of prosecutorial misconduct only if defendant has shown that 'the actions or remarks of [prosecuting] counsel call to the attention of the jury a matter it would not be justified in considering in determining its verdict, and, if so, under the circumstances of the particular case, whether the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result....'" *State v. Cummins*, 839 P.2d 848, 852 (Utah App.1992) (quoting *State v. Peters*, 796 P.2d 708, 712 (Utah App.1990)), *cert. denied*, 853 P.2d 897 (Utah 1993).

The prosecutor repeatedly called to the attention of the jury Hatch's "convictions" on two counts of forgery. However, at the time of trial, Hatch only had admitted the offenses in a recent change of plea hearing. She was not yet sentenced. Under Rule 609(a), the jury never should have been informed of Hatch's pending convictions and made use of this information in determining its verdict.

The prosecutor also repeatedly called to the attention of the jury Sergeant Hatzidakis' impression of the veracity of Hatch and her reputation in the community for untruthfulness. Rule 608(a), though, bars using one witness to comment on the credibility of another witness. Furthermore, under the rule it is axiomatic that reputation evidence is inadmissible without the proponent of the evidence laying proper foundation. In view of this, the jury never should have heard the prosecutor's remarks along with Hatzidakis' testimony and considered these matters in reaching a verdict.

The errors that occurred were substantial and prejudicial in nature. They represented significant violations of the rules of evidence. They came at critical junctures in the trial, in particular opening statement, cross-examination of the defendant and closing argument. They undoubtedly swayed the jury in assessing the credibility of Hatch and Wilson as witnesses. Most fundamentally, the errors obviated Hatch's right to

due process and fundamental fairness at trial. There is a reasonable likelihood that, in the absence of the errors, Hatch would have had a more favorable result.

In addition to all this, the prosecutor, in opening statement, told the jury, "And after the case is over, the best thing here today is, I am going to be able to give Grace her saddle back." Tr. 108, ll. 15-17. This implied, at the very least, that the prosecutor believed that Hatch stole it. Shortly later the prosecutor said, "But you are here to do one thing, and that's to find the truth. And the truth is this defendant got mad, she tore up Bill Wilson's storage shed, busted up his entertainment center. She took the saddle. ...Saddle went down to Jiffy Pawn. Jiffy Pawn made out the money. They are out the money. Grace is out the saddle. And the defendant is here today to answer for it." Tr. 109, ll. 13-22. Here the prosecutor's belief in Hatch's guilt, as well as his belief concerning the central disputed fact in the case, was made explicit.

The jury should not have heard what the prosecutor said. "A prosecutor is not allowed to express his personal opinion as to the truth or falsity of testimony, the guilt of the defendant, or the justness of the prosecution. (Citing *ABA Standards*, 3-5.8(b) ("The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.")). Such remarks are

forbidden for two reasons: they unfairly exploit the prosecutor's standing and prestige with the jury, and they imply that the prosecutor has access to information outside the record that supports his assertions. (Citing *United States v. Young*, 470 U.S. 1, 18-19 (1985))." *Trial Error and Misconduct*, *supra*, at 186.

The position of the supreme court, in this jurisdiction, is in accord with the *ABA Standards* and *Young*. "[A] prosecutor engages in misconduct when he or she asserts personal knowledge of the facts in issue or expresses personal opinion, being 'a form of unsworn, unchecked testimony [which] tends[s] to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued." *State v. Parsons*, 781 P.2d 1275, 1284 (Utah 1989) (quoting *State v. Lafferty*, 749 P.2d 1239, 1255-56 (Utah 1988)) (alterations in original).

The remarks of the prosecutor in opening statement, in the form that they took, constitute reversible prosecutorial misconduct. They were error. The error was substantial and prejudicial in that the prosecutor's assertions of personal knowledge and belief were made when the jury was forming its first and perhaps lasting impression of the case. The error was magnified further because of the nature of the case, in essence a

swearing contest between Hatch and Wilson, and the introduction of Rule 609 and Rule 608 evidence against Hatch throughout trial. The prosecutor crossed the line marking the boundary of zealous advocacy. Had he not done so, there was in fact a reasonable likelihood of a more favorable result for Hatch.

IV. CUMULATIVE ERROR

> *The errors committed during trial were substantial. Even if they were harmless individually, they were harmful cumulatively. It cannot be said, with any degree of confidence, that Hatch received a fair trial.*

The instant appeal, perhaps most basically, is about prosecutorial overzealousness. The counsel that the United States Supreme Court gave to prosecutors in 1935 comes to mind and certainly is as relevant now as it was then.

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor–indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means

to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). The prosecutor, here, did not just strike hard blows. He struck foul blows. More than that, he struck foul blows over and over again in opening statement, the case in chief, closing argument and rebuttal.

The foul blows in opening statement were that the prosecutor referred to Hatch's pending forgery convictions, Sergeant Hatzidakis' impression of Hatch's veracity during his interview of her, his own belief about Hatch's guilt and his own opinion concerning facts in issue. The foul blows in the case in chief were that the prosecutor impeached Hatch using only pending convictions and asked Hatzidakis about Hatch's credibility during interview and her reputation in the community for untruthfulness despite lack of foundation. The foul blows in closing argument and rebuttal were that the prosecutor again pointed out Hatch's pending convictions and her reputation in the community.

The cumulative error doctrine, without question, is applicable to the instant case. *See State v. Bryant*, 965 P.2d 539, 550 (Utah App.1998). The errors that were committed during the course of trial were substantial in nature. Even if they were harmless individually, they were harmful cumulatively. They raise the very serious question of whether Hatch received a fair trial. Hatch believes that the court of appeals

cannot say, with any degree of confidence, that she was given a fair trial. Accordingly, all of Hatch convictions should be reversed on this separate ground.

V. INSUFFICIENT EVIDENCE

There was not sufficient evidence to convict Hatch on any of the three counts with which she was charged.

An element of burglary is entering or remaining unlawfully in a building. In the instant case, there was no direct evidence that Hatch went to Seeley's Storage and broke into Wilson's storage unit. No one saw Hatch break in. No physical evidence, such as fingerprints, linked Hatch to the crime scene. No stolen property, except for the allegedly stolen saddle, was ever found in Hatch's possession. The jury's verdict, on this count, was based on Wilson's testimony that the saddle was in his storage unit in March 1997 together with the fact, never disputed, that Hatch took the saddle to Jiffy Pawn and sold it. The jury did not believe Hatch's version of events, in particular her testimony that Wilson gave her the saddle as compensation for property that he had taken from her. The jury inferred that Hatch must have been the party who broke into Wilson's storage unit. However, viewed objectively, the jury's inference was unreasonable. It rested not on good evidence but bad evidence, specifically that Hatch was a bad person who had been convicted of crimes of dishonesty in the past, appeared to be lying when Sergeant

Hatzidakis interviewed her, and supposedly had a reputation for untruthfulness in the community. The jury should not have heard or considered any of this bad evidence. Absent it, Hatch's credibility at trial would have been much greater. The jury would have had a much more difficult even impossible time deciding whether Wilson or Hatch was telling the truth. Accordingly, members of the jury must have entertained a reasonable doubt that Hatch entered Wilson's storage unit and actually committed the crime of burglary. Hatch's conviction on count (I) should be reversed. *See State v. Longshaw*, 961 P.2d 925, 931 (Utah App.1998) (regarding claims of insufficiency of evidence, the court of appeals reviews the evidence and all reasonable inferences drawn from that evidence in the light most favorable to the jury's verdict and will reverse only if that evidence is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which she was convicted).

The same analysis applies to count (II), theft by deception, and count (III), theft. There was deception, with respect to Jiffy Pawn, only if Hatch wrongfully was in possession of the saddle. There was theft only if Hatch stole the saddle along with other items of property from Wilson's storage unit. The jury's inferences that Hatch did not

receive the saddle from Wilson and that she in fact took the saddle and other property were based, again, on Wilson's testimony and more fundamentally his witness credibility as opposed to her witness credibility. Hatch's credibility was irreparably damaged by bad evidence that the prosecutor repeatedly used against her at trial. Had the jury not been presented with such evidence, there is every likelihood that reasonable minds would have entertained reasonable doubt that Hatch committed the crimes of theft by deception and theft.

CONCLUSION

The court of appeals should reverse Hatch's convictions on all three counts and remand the case to the trial court for proceedings consistent with its opinion.

DATED this 22 day of June, 1999.

WESLEY M. BADEN
Attorney for Defendant and Appellant

CERTIFICATE OF MAILING

On this 22 day of June, 1999 I mailed, by United States Post Office overnight express mail, the original and eight copies of this brief of appellant to:

Appellate Clerks' Office
Utah Court of Appeals
450 South State
P. O. Box 140230
Salt Lake City, Utah 84114-0230

On this 22 day of June, 1999 I also mailed, by United States Post Office overnight mail, two copies of this brief of appellant to:

Criminal Appeals Division
Utah Attorney General's Office
160 East 300 South, Sixth Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854

ADDENDUM

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IN THE EIGHTH JUDICIAL DISTRICT COURT

COUNTY OF UINTAH, STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff.	:	JUDGMENT AND ORDER OF COMMITMENT
vs.	:	
KANDICE HATCH,	:	CASE NO. 981800008 FS Judge John R. Anderson
Defendant.	:	

This matter having come on regularly before this Court for sentencing on the 11th day of August, 1998, the Honorable John R. Anderson presiding. The State being represented by JoAnn B. Stringham, Uintah County Attorney, and the Defendant being personally present and represented by counsel, John C. Beaslin.

The defendant having been convicted of or having plead guilty to two counts of FORGERY, Third Degree felonies, in violation of Section 76-6-501, Utah Code Annotated, 1953, as amended.

The Court, having received a Pre-Sentence Investigation Report from the Department of Corrections, having reviewed the same, the Defendant, having previously been furnished the said Pre-Sentence Investigation Report, admitted there were no inaccuracies

or was furnished the opportunity to have a hearing to challenge any claimed inaccuracies, and no legal reason having been shown why judgment and sentencing should not be pronounced, entered a Judgment as follows:

1. That the Defendant is hereby sentenced on Count I, FORGERY, a Third Degree Felony, to serve zero (0) to Five (5) years in the Utah State Prison.

2. That the Defendant is sentenced on Count II, FORGERY, a Third Degree Felony, to serve zero (0) to Five (5) years in the Utah State Prison.

3. That these prison terms be served concurrent with each other and with Judge Payne's burglary charge, Case No. 971800246.

4. That the Defendant pay restitution in the total amount of ONE THOUSAND FORTY AND NO/100 DOLLAR ($1,040.00). Said restitution should be paid to the Eighth Judicial District Court and reimbursed to the victims as follows:

a. NINE HUNDRED SIXTY DOLLARS ($960.00) payable to Davis IGA, 575 West Main, Vernal, Utah 84078.

b. EIGHTY DOLLARS ($80.00) payable to Smith's Food King, 1080 West Highway 40, Vernal, Utah 84078.

IT IS HEREBY ORDERED:

That the Defendant is forthwith remanded to the custody of the Uintah County Sheriff for transportation to the Utah State Prison and execution of the sentence given herein.

DATED this 27 day of August, 1998.

JOHN R. ANDERSON
District Court Judge

APPROVED AS TO FORM:

JOHN C. BEASLIN
Attorney for Defendant

CERTIFICATE OF MAILING/HAND DELIVERY

I do hereby certify that I mailed, postage prepaid, or hand delivered, a true copy of the foregoing JUDGMENT AND ORDER OF COMMITMENT to John C. Beaslin, Attorney for Defendant, 185 North Vernal Avenue, Vernal, UT 84078; Department of Corrections, 152 East 100 North, Vernal, UT; and the Uintah County Jail, Vernal, UT 84078.

STATE OF UTAH
County of Uintah

I, Joanne McKee, Clerk of the District Court, do hereby certify that the above and foregoing is a full, true and correct copy of the original document which is on file in my office
In witness whereof I have hereunto set my hand and seal of that said Court above mentioned, this 27th day of June A.D. 1998

JOANNE McKEE
By Candace Hall Deputy

STATE OF UTAH
EIGHTH DISTRICT COURT
VERNAL